

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REGINA MANANTAN,

Plaintiff,

v.

NATIONAL CITY MORTGAGE, et al.,

Defendants.

No. C-11-00216 CW

ORDER GRANTING
DEFENDANTS'
MOTIONS TO
DISMISS (Docket
Nos. 5 and 8) AND
DENYING AS MOOT
DEFENDANT PNC'S
MOTION TO STRIKE
(Docket No. 9)

Defendants GMAC Mortgage, LLC and ETS Services, LLC move to dismiss the complaint of Plaintiff Regina Manantan. Defendant PNC Bank, N.A., as successor by merger to National City Bank, sued as National City Mortgage (NCM) and National City Bank of Indiana (NCB), separately moves to dismiss and moves to strike portions of Plaintiff's complaint. Plaintiff opposes the motions. Having considered all of the papers filed by the parties, the Court grants the motions to dismiss and denies as moot the motion to strike.

BACKGROUND

Plaintiff alleges that in April 2006 she engaged the services of mortgage broker American Prime Financial (APF) to refinance the existing home mortgage loan on her primary residence located at 2671 Hacienda Street in San Mateo, California. Compl. ¶¶ 9, 12. APF prepared a loan application on Plaintiff's behalf, which was

1 approved by NCM. Compl. ¶ 13. On July 7, 2006, Plaintiff executed
2 an adjustable rate note in the amount of \$825,000, naming NCM as
3 the lender and payee, and a deed of trust securing repayment of the
4 Note, naming NCB as the trustee. Compl. ¶¶ 16-17.

5 On May 18, 2010, NCB recorded an "Assignment of Deed of Trust"
6 assigning its rights under the deed to GMAC. Compl. Ex. E at 3.
7 On August 13, 2010, GMAC recorded a "Substitution of Trustee,"
8 naming ETS as the trustee in place of NCB. Compl. Ex. C. On the
9 same date, ETS recorded a "Notice of Default and Election to Sell
10 under Deed of Trust." Compl. Ex. D. On November 12, 2010, ETS
11 recorded a "Notice of Trustee's Sale" of the property to be held on
12 December 9, 2010. Compl. ¶ 24.

13 Plaintiff alleges that APF¹ and NCM failed to (1) explain a
14 mortgage broker fee paid by NCM to APF, Compl. ¶ 18.1; (2) explain
15 the consequences of the Yield Spread Premium included in
16 Plaintiff's loan, Compl. ¶ 18; (3) make disclosures required by
17 California Civil Code § 1916.7(10)(c), Compl. ¶ 19; and (4) verify
18 Plaintiff's income and ability to repay the loan, Compl. ¶¶ 13, 15.

19 Plaintiff alleges that GMAC and ETS lack authority to carry
20 out the pending foreclosure sale of her property because (1) NCM
21 committed fraud in the origination of Plaintiff's loan, Compl.
22 ¶¶ 56-60; (2) GMAC is not the "holder in due course" of the note,
23 Compl. ¶¶ 49-50; (3) Defendants have not followed the correct
24 procedures to assign GMAC as beneficiary under the deed and to
25 substitute ETS as the trustee of the deed, Compl. ¶ 62; and

26
27 ¹Although many of Plaintiff's allegations concern the conduct
28 of APF, APF is not a named defendant in this action.

1 (4) Defendants did not post the Notice of Trustee's Sale in a
2 public place or publish it in a newspaper of general circulation,
3 Compl. ¶ 61.

4 LEGAL STANDARD

5 A complaint must contain a "short and plain statement of the
6 claim showing that the pleader is entitled to relief." Fed. R.
7 Civ. P. 8(a). On a motion to dismiss under Rule 12(b)(6) for
8 failure to state a claim, dismissal is appropriate only when the
9 complaint does not give the defendant fair notice of a legally
10 cognizable claim and the grounds on which it rests. Bell Atlantic
11 Corp. v. Twombly, 550 U.S. 544, 555 (2007). In considering whether
12 the complaint is sufficient to state a claim, the court will take
13 all material allegations as true and construe them in the light
14 most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792
15 F.2d 896, 898 (9th Cir. 1986). However, this principle is
16 inapplicable to legal conclusions; "threadbare recitals of the
17 elements of a cause of action, supported by mere conclusory
18 statements," are not taken as true. Ashcroft v. Iqbal, ___ U.S.
19 ___, 129 S.Ct. 1937, 1949-50 (2009) (citing Twombly, 550 U.S. at
20 555).

21 Although the court is generally confined to consideration of
22 the allegations in the pleadings, when the complaint is accompanied
23 by attached documents, such documents are deemed part of the
24 complaint and may be considered in evaluating the merits of a Rule
25 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d 1265,
26 1267 (9th Cir. 1987).

27 When granting a motion to dismiss, the court is generally
28

1 required to grant the plaintiff leave to amend, even if no request
2 to amend the pleading was made, unless amendment would be futile.
3 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
4 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
5 would be futile, the court examines whether the complaint could be
6 amended to cure the defect requiring dismissal "without
7 contradicting any of the allegations of [the] original complaint."
8 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
9 Leave to amend should be liberally granted, but an amended
10 complaint cannot allege facts inconsistent with the challenged
11 pleading. Id. at 296-97.

12 DISCUSSION

13 I. Liability for Causes of Action Accruing at Origination

14 GMAC and ETS move to dismiss Plaintiff's Third, Fourth, Fifth,
15 Sixth, Seventh, Eighth, Ninth, and Twelfth Causes of Action because
16 they arise from conduct that took place at the time the loan
17 originated, before GMAC was assigned the rights under the deed and
18 ETS was substituted as trustee. Plaintiff contends that GMAC and
19 ETS are liable for these causes of action because they "ratified
20 the wrongful conduct of the originating Defendants." Pl. Opp. at
21 4.

22 Plaintiff cites River Colony Estates Gen. Partnership v.
23 Bayview Fin. Trading Group, 287 F. Supp. 2d. 1213 (S.D. Cal. 2003),
24 for the proposition that a party's knowledge of a failure to
25 disclose loan terms "coupled with substantial assistance" by that
26 party supports liability "for aiding and abetting breach of
27 fiduciary duty." Pl. Opp. at 4. River Colony actually states: "To
28

1 establish liability for aiding and abetting, plaintiffs must prove:
2 (1) the fact of perpetration of the overall improper scheme;
3 (2) the aider and abettor's knowledge of such a scheme; and (3) the
4 aider and abettor's substantial assistance furthered the scheme."
5 287 F. Supp. 2d at 1225.

6 Here, Plaintiff has not alleged that GMAC and ETS had
7 knowledge of the scheme or provided any assistance to the
8 originators of her loan, let alone "substantial assistance" in
9 furtherance of the allegedly improper acts. As Plaintiff admits,
10 GMAC and ETS were not involved in the origination of the loan. Pl.
11 Opp. at 4. Thus, they could not have provided substantial
12 assistance to the other Defendants at that time.

13 Accordingly, Plaintiff's Third, Fourth, Fifth, Sixth, Seventh,
14 Eighth, Ninth, and Twelfth Causes of Action fail to state a claim
15 against GMAC and ETS, and their motion to dismiss these claims is
16 granted with leave to amend.

17 II. Statute of Limitations

18 All Defendants move to dismiss Plaintiff's Third, Fourth,
19 Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Causes of Action
20 as barred by the applicable statutes of limitations.

21 The relevant statutes of limitations are summarized as
22 follows: The Third Cause of Action, for violation of the
23 California Unfair Competition Law (UCL), California Business &
24 Professions Code § 17200 et seq., is subject to a four year statute
25 of limitations. Cal. Bus. & Prof. Code § 17208. The Fourth Cause
26 of Action, for "Reformation/Revision," the Sixth, for "Damages By
27 Reason of Deceit," and the Seventh, for "Fraud," are all based on

1 underlying allegations of fraud, as Plaintiff concedes. Pl. Opp.
2 at 4-6. They are therefore subject to a three year statute of
3 limitations pursuant to California Code of Civil Procedure
4 § 338(d). The Fifth Cause of Action, for violation of California
5 Civil Code § 1916.7(c), appears to be subject to a three year
6 limitations period pursuant to California Code of Civil Procedure
7 § 338(a). The Eighth Cause of Action, for negligence based on
8 violations of 15 U.S.C. § 1639(h) or 12 C.F.R. § 226.34, is subject
9 to a two year limitations period. Cal. Code Civ. Proc. § 339(1);
10 Jackson v. Cedars-Sinai Med. Ctr., 220 Cal. App. 3d 1315, 1319-21
11 (1990) (holding that where a cause of action based on a statute
12 "sounds in tort," the statute of limitations for tort actions
13 rather than statutory violations applies). The Ninth Cause of
14 Action, for breach of the covenant of good faith and fair dealing,
15 and the Eleventh Cause of Action, for rescission/cancellation of
16 the loan agreement, are contract actions and are both subject to a
17 four year statute of limitations period pursuant to California Code
18 of Civil Procedure § 337.

19 Defendants point out that the conduct alleged in these causes
20 of action all was committed on or before July 2006, when
21 Plaintiff's loan originated, while she filed this suit in December
22 2010. Defendants argue, therefore, that these causes of action are
23 time-barred. Plaintiff does not dispute that these causes of
24 action were filed after the statutes of limitations had run, but
25 argues that, because she only recently discovered the existence of
26 her claims, at least some of them are subject to equitable tolling.

27 Plaintiff bases her equitable tolling argument on Fonua v.
28

1 First Allied Funding, 2009 WL 816291 (N.D. Cal.), arguing that the
2 time to bring an action is calculated from the time a plaintiff
3 discovers the fraudulent conduct. Equitable tolling requires more
4 than just the plaintiff's ignorance of the claims. In general,
5 equitable tolling may be applied if, despite all due
6 diligence, a plaintiff is unable to obtain vital information
7 bearing on the existence of his claim. . . . If a reasonable
8 plaintiff would not have known of the existence of a possible
9 claim within the limitations period, then equitable tolling
10 will serve to extend the statute of limitations for filing
11 suit until the plaintiff can gather what information he needs.
12 Santa Maria v. Pacific Bell, 202 F.3d 1170, 1178 (9th Cir. 2000).
13 The court in Fonua agreed that equitable tolling requires that a
14 plaintiff "might not have had a reasonable opportunity to discover"
15 his or her claims within the statute of limitations period. 2009
16 WL 816291, at *2 (citing King v. State of Cal., 784 F.2d 910, 915
17 (9th Cir. 1986)).

18 Plaintiff does not allege that she did not have a "reasonable
19 opportunity" to discover the conduct alleged in her complaint, or
20 that she was unable to obtain the information she needed before the
21 statute of limitations expired on her claims. Instead, she alleges
22 that she had doubts that NCM and APF had complied with all
23 applicable laws in issuing her loan, and in September 2010 engaged
24 the services of a forensic loan examiner, who informed her of the
25 alleged violations. Plaintiff does not specify what led her to
26 doubt the legality of NCM and APF's actions, when her doubts arose
27 or why she waited until September 2010 to have her loan documents
28 examined. According to the Complaint, between July 2006 and
September 2010, two significant events took place: In March 2010,
Plaintiff stopped making payments on her mortgage, and five months

1 later, in August, she received the Notice of Default. However,
2 Plaintiff does not allege that the Notice gave her any new
3 information that led to doubts about the origination of the loan.
4 Nor does Plaintiff allege that she was prevented from engaging the
5 services of the forensic loan examiner at an earlier point in time.
6 Indeed, Plaintiff admits that she was given the loan documents
7 after the transaction closed. It appears that in or shortly after
8 July 2006 she was in possession of all the information she provided
9 to the forensic loan examiner in September 2010.

10 Plaintiff argues that "merely having the papers does not give
11 Plaintiff notice that he [sic] has been defrauded." Pl. Opp. at 6.
12 District courts in this circuit have split on the applicability of
13 equitable tolling in the context of residential mortgages. See
14 Diaz v. Bank of America Home Loan Servicing, 2010 WL 5313417, at
15 *3-4. (C.D. Cal.) (noting cases where failure to translate mortgage
16 terms into Spanish for non-English speakers held sufficient to
17 invoke equitable tolling, but ultimately agreeing with cases
18 denying equitable tolling where plaintiffs failed to act diligently
19 to have their loan documents translated or reviewed). Particularly
20 applicable here is Ortega v. Wells Fargo Bank, 2010 WL 1904878
21 (S.D. Cal.). In Ortega, the court denied equitable tolling to the
22 plaintiff, who submitted documents for "forensic review" two years
23 after receiving his loan and months after he stopped making
24 mortgage payments. Id. at *3. The court held, "Any irregularities
25 in [plaintiff's] loan would have been apparent from the face of the
26 documents he received at closing. [Plaintiff's] belated efforts at
27 finding the alleged irregularities preclude his . . . claim." Id.

1 The Court finds the reasoning of Ortega persuasive. From the
2 time she received the loan documents, Plaintiff appears to have
3 been in possession of all the facts needed for the forensic loan
4 examiner to uncover the alleged violations more than four years
5 later. The fact that she came to have doubts about the validity of
6 her loan only after she stopped making payments and had received
7 the Notice of Default demonstrates that she was less than diligent
8 in uncovering her claims. Because the Complaint does not allege
9 the basis for equitable tolling of the statutes of limitations for
10 Plaintiff's Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth,
11 and Eleventh Causes of Action, Defendants' motion to dismiss these
12 causes of action is granted with leave to amend.

13 III. Quiet Title

14 Plaintiff's Tenth Cause of Action asks that title in the
15 property be quieted in her favor. To state a claim for quiet title
16 under California law, a plaintiff's complaint must contain: (1) a
17 description of the property; (2) the title of the plaintiff and its
18 basis; (3) the adverse claims to that title; (4) the date as of
19 which the determination is sought; and (5) a prayer for relief of
20 quiet title. Cal. Code Civ. Proc. § 761.020. In addition, a
21 plaintiff seeking to quiet title in the face of foreclosure must
22 allege tender of an offer of the amount borrowed. Mangindin v.
23 Wash. Mut. Bank, 637 F. Supp. 2d 700, 712 (N.D. Cal. 2009); Arnolds
24 Mgmt. Corp. v. Eischen, 158 Cal. App. 3d 575, 578-79 (1984) (claim
25 to set aside trustee's sale must be accompanied by offer to pay
26 full amount of debt for which the property was security).

27 Defendants argue that the claim for quiet title fails because
28

1 Plaintiff has not alleged or argued that she can tender the amount
2 of the indebtedness. Plaintiff responds that the tender rule is
3 "antiquated and unreasonable," and contends that she is "not
4 required to 'do equity' or make tender on a contract that has been
5 procured through fraud." Pl. Opp. at 16. Plaintiff cites
6 Truesdail v. Lewis, 45 Cal. App. 2d 718 (1941), in which the court
7 allowed an action to quiet title to proceed without an allegation
8 of tender. However, Truesdail does not support Plaintiff's
9 argument. The court in Truesdail made clear that any final
10 determination quieting title in the plaintiff's favor would be
11 "subject to his paying [defendant] the money which he received on a
12 void transaction." Id. at 722.

13 Plaintiff argues that if the Court does not grant her quiet
14 title and allows the foreclosure sale to proceed, tender will be
15 satisfied upon foreclosure. Plaintiff fails to acknowledge that,
16 if the Court does grant her quiet title, she still would be
17 required to tender the loan amount. To vest title in a defaulting
18 borrower without tender of the loan amount would be inequitable to
19 the lender. The lender would be deprived not only of the money it
20 loaned to the borrower, but also of title to the property it took
21 as security for the loan. Defendants' alleged fraud may void the
22 transaction between Plaintiff and Defendants, but it would not
23 allow Plaintiff to gain quiet title and keep the money she
24 borrowed.

25 Because Plaintiff has not alleged that she can now or will in
26 the future be able to tender the amount borrowed, Defendants'
27 motion to dismiss her Tenth Cause of Action is granted with leave
28

1 to amend.

2 IV. Unjust Enrichment

3 PNC argues that Plaintiff's Twelfth Cause of Action should be
4 dismissed because "unjust enrichment" is not a cause of action in
5 California. California courts appear to be split as to whether
6 there is an independent cause of action for unjust enrichment.
7 Baggett v. Hewlett-Packard Co., 582 F. Supp. 2d 1261, 1270-71 (C.D.
8 Cal. 2007) (applying California law). One view is that unjust
9 enrichment is not a cause of action, or even a remedy, but rather a
10 general principle, underlying various legal doctrines and remedies.
11 McBride v. Boughton, 123 Cal. App. 4th 379, 387 (2004). In
12 McBride, the court construed a "purported" unjust enrichment claim
13 as a cause of action seeking restitution. Id. There are at least
14 two potential bases for a cause of action seeking restitution:
15 (1) an alternative to breach of contract damages when the parties
16 had a contract which was procured by fraud or is unenforceable for
17 some reason; and (2) where the defendant obtained a benefit from
18 the plaintiff by fraud, duress, conversion, or similar conduct and
19 the plaintiff chooses not to sue in tort but to seek restitution on
20 a quasi-contract theory. Id. at 388. In the latter case, the law
21 implies a contract, or quasi-contract, without regard to the
22 parties' intent, to avoid unjust enrichment. Id.

23 Another view is that a cause of action for unjust enrichment
24 exists and its elements are "receipt of a benefit and unjust
25 retention of the benefit at the expense of another." Lectrodryer
26 v. SeoulBank, 77 Cal. App. 4th 723, 726 (2000); First Nationwide
27 Savings v. Perry, 11 Cal. App. 4th 1657, 1662-63 (1992).

1 Plaintiff has not stated a basis for a restitutionary remedy
2 against Defendants. Instead, Plaintiff vaguely claims that
3 "Defendant NCM (or its successor/s in interest) has been unjustly
4 enriched to the detriment of Plaintiff by wrongfully collecting
5 money to which Defendant NCM, in equity, is not entitled.
6 Defendant NCM has retained the amounts wrongfully collected."
7 Compl. ¶ 157. In her opposition, Plaintiff identifies these
8 amounts as the "illegal kickback fees, in the form of the [yield
9 spread premium]." Pl. Opp. at 17. These allegations do not appear
10 in the Complaint. Plaintiff's Twelfth Cause of Action fails to
11 state a claim against Defendants for unjust enrichment.
12 Defendants' motion to dismiss is granted with leave to amend.

13 V. Unconscionability

14 All Defendants move to dismiss Plaintiff's Thirteenth Cause of
15 Action on the basis that unconscionability is not a cause of action
16 but a defense to enforcement of a contract. Plaintiff's Thirteenth
17 Cause of Action cites California Civil Code §§ 1670.5 and 1770(s).²
18 Compl. ¶ 162.

19 Civil Code § 1670.5 provides a defense to the enforcement of
20 an unconscionable contract rather than an affirmative cause of
21 action. See Jones v. Wells Fargo Bank, 112 Cal. App. 4th 1527,
22 1539 (2003). And, although the Consumer Legal Remedies Act does
23 create an affirmative cause of action for unconscionability in
24 Civil Code §§ 1770(a)(19) and 1780, see Cal. Grocers Ass'n. v. Bank
25 of America, 22 Cal. App. 4th 205, 217-18 (1994), the CLRA does not

26
27 ²Civil Code § 1770(s) was redesignated § 1770(a)(19) in 1996.
28

1 apply to transactions involving the sale of real property. McKell
2 v. Washington Mut., Inc., 142 Cal. App. 4th 1457, 1488 (2006).

3 Therefore, Plaintiff fails to state a claim for unconscionability,
4 and Defendants' motion to dismiss the Thirteenth Cause of Action is
5 granted without leave to amend.

6 VI. Injunctive Relief

7 Plaintiff's Fourteenth Cause of Action seeks injunctive relief
8 in the form of a temporary restraining order and a preliminary
9 injunction against the sale of Plaintiff's property. "Injunctive
10 relief is a remedy, not a cause of action." Guessous v. Chrome
11 Hearts, LLC, 179 Cal. App. 4th 1177, 1187 (2009) (quoting City of
12 South Pasadena v. Dep't of Transp., 29 Cal. App. 4th 1280, 1293
13 (1994)). Plaintiff's citation to San Diego Unified Port Dist. v.
14 Gallagher, 62 Cal. App. 4th 501, 503 (1998), is not to the
15 contrary. As stated in Gallagher, a claim for injunctive relief
16 requires Plaintiff to prove "the elements of a cause of action
17 involving the wrongful act sought to be enjoined." Id. This makes
18 clear that injunctive relief is not itself a separate cause of
19 action. Accordingly, Defendants' motion to dismiss Plaintiff's
20 Fourteenth Cause of Action is granted without leave to amend.
21 Plaintiff may seek injunctive relief as a remedy if she is able to
22 state a valid cause of action.

23 VII. Declaratory Relief

24 Plaintiff's First and Second Causes of Action seek
25 declarations that the note, Substitution of Trustee, Notice of
26 Default and Notice of Trustee's Sale are "void ab initio," that
27 GMAC cannot collect payments under the note, and that ETS lacks
28

1 authority to foreclose on Plaintiff's property and conduct a
2 trustee's sale.

3 When a claim for declaratory relief is removed to federal
4 court, the court must conduct its analysis under the Declaratory
5 Judgment Act (DJA). See Golden Eagle Ins. Co. v. Travelers Cos.,
6 103 F.3d 750, 753 (9th Cir. 1996), overruled on other grounds by
7 Gov't Emps. Ins. v. Dizol, 133 F.3d 1220 (9th Cir. 1998); see also
8 Gamble v. GMAC Mortgage Corp., 2009 WL 400359, at *2 (N.D. Cal.).
9 The DJA permits a federal court to "declare the rights and other
10 legal relations" of parties to "a case of actual controversy." 28
11 U.S.C. § 2201; see Wickland Oil Terminals v. Asarco, Inc., 792 F.2d
12 887, 893 (9th Cir. 1986). The "actual controversy" requirement of
13 the Declaratory Judgment Act is the same as the "case or
14 controversy" requirement of Article III of the United States
15 Constitution. American States Ins. Co. v. Kearns, 15 F.3d 142, 143
16 (9th Cir. 1993).

17 Defendants argue that there is no "actual controversy"
18 underlying Plaintiff's claims because they concern past wrongdoing.
19 Plaintiff responds that there is a pending foreclosure sale of her
20 property. This appears to satisfy the "actual controversy"
21 requirement for declaratory relief.

22 Plaintiff presents four theories underlying her claim for
23 declaratory relief that the pending foreclosure sale is invalid:
24 (1) NCM committed fraud in the origination of her loan; (2) GMAC is
25 not the "holder in due course" of her note; (3) Defendants have not
26 followed the correct procedures to assign GMAC as beneficiary under
27 the deed and to substitute ETS as the trustee of the deed; and
28

1 (4) Defendants did not post the Notice of Trustee's Sale in a
2 public place or publish it in a newspaper of general circulation.

3 Plaintiff alleges that she is entitled to declaratory relief
4 because the inclusion of a yield spread premium that was not
5 disclosed or explained to her by NCM constituted fraud, rendering
6 the note, Substitution of Trustee, Notice of Default and Notice of
7 Trustee's Sale illegal and invalid. Compl. ¶¶ 56-60. However, as
8 noted above, Plaintiff's fraud claims (Sixth and Seventh Causes of
9 Action) are time-barred. "[T]he statute of limitations governing a
10 request for declaratory relief is the one applicable to an ordinary
11 legal or equitable action based on the same claim." Mangini v.
12 Aerojet-General Corp., 230 Cal. App. 3d 1125, 1155 (1991). As a
13 result, Plaintiff's declaratory relief causes of action based on
14 fraud are also time-barred.

15 Plaintiff also seeks declaratory relief on the grounds that
16 GMAC is not in physical possession of the original note. Compl. ¶
17 48. Plaintiff argues that only the "holder in due course" of the
18 note can collect payments and initiate a foreclosure of the
19 property. Id. ¶¶ 49-50.

20 "The statutory provisions regulating the nonjudicial
21 foreclosure of deeds of trust are contained in [Civil Code]
22 sections 2924-2924i. These provisions cover every aspect of
23 exercise of the power of sale contained in a deed of trust." I.E.
24 Assocs. v. Safeco Title Ins. Co., 39 Cal.3d 281, 285 (1985).
25 Importantly, these provisions "contain[] no requirement that the
26 lender produce the original note to initiate the foreclosure
27 process." Gamboc v. Tr. Corps, 2009 WL 656285, at *4 (N.D. Cal.).

Whether or not GMAC is in possession of Plaintiff's Note is irrelevant to its authority to collect payments and initiate a non-judicial foreclosure. Plaintiff's allegations on this point are therefore not sufficient to state a claim for declaratory relief.

Plaintiff next seeks declaratory relief based on her allegations that "Defendant ETS has not been legally and/or properly appointed as substitute/successor trustee." Compl. ¶ 62. Plaintiff's allegations are contradicted by the documents attached to and referred to in Plaintiff's Complaint. Plaintiff quotes paragraph 24 of the deed, which provides that the lender may appoint a successor trustee by an instrument which "contain[s] the name of the original Lender, Trustee and Borrower . . . and the name and address of the successor trustee." GMAC and ETS Request for Judicial Notice, Ex. A ¶ 24.³ Following these procedures, GMAC, the assigned beneficiary of the deed, executed the Substitution of Trustee naming NCB as the original trustee and NCM as the original beneficiary, and provided the name and address of

³GMAC and ETS filed a Request for Judicial Notice of Plaintiff's First Deed of Trust. Plaintiff referred to this Deed of Trust in her Complaint and purported to attach it as Exhibit B, although she actually attached the Second Deed of Trust. See Compl. ¶ 16(3) & Ex. B. "Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). However, under the incorporation by reference doctrine, when a plaintiff alleges in his or her complaint the contents of documents whose authenticity is not challenged but does not attach them to the pleadings, such documents may be introduced by the defendants and may be considered in ruling on a Rule 12(b)(6) motion. Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005). Because Plaintiff referred to the document and intended to attach it to the Complaint, the Court will consider the Deed of Trust incorporated by reference, and denies as moot the Request for Judicial Notice of GMAC and ETS.

1 ETS, the substitute trustee. Compl. Ex. C. Because Plaintiff's
2 allegations of improper procedures are plainly contradicted by
3 documents attached to and referred to in her Complaint, she fails
4 to state a claim that ETS was improperly appointed as the trustee
5 under the deed.

6 Finally, Plaintiff seeks declaratory relief on the grounds
7 that she is

8 not aware of any fact showing that the Notice of Trustee's
9 Sale . . . has been published in a newspaper of general
10 circulation in the County of San Mateo, State of California,
nor has it been posted in at least one public place in the
City of San Mateo, County of San Mateo, State of California.

11 Compl. ¶ 61. Although not cited in the Complaint or Plaintiff's
12 brief, the requirements that a notice of trustee's sale be
13 published and posted come from California Civil Code § 2924f.
14 However, the notice requirements are waived if actual notice is
15 received. See 4 Miller & Starr, California Real Estate § 10:199
16 (3d ed.).

17 Plaintiff received the Notice of Trustee's Sale and attached
18 it to the Complaint. Compl. ¶ 24 & Ex. E. Even if the posting and
19 publication requirements have not been satisfied, Plaintiff has
20 received actual notice. Any other notice requirements are
21 therefore waived. Plaintiff's allegations on this point fail to
22 state a basis for the declaratory relief she seeks.

23 Because the allegations underlying Plaintiff's causes of
24 action for declaratory relief are either time-barred or fail to
25 allege any wrongdoing by Defendants, there is no "actual
26 controversy" existing between Plaintiff and Defendants justifying
27 declaratory relief. Accordingly, Defendants' motions to dismiss
28

1 Plaintiff's First and Second Causes of Action are granted with
2 leave to amend to plead a valid basis for declaratory relief.

3 VIII. PNC's Motion to Strike

4 Because the Court has dismissed all of Plaintiff's causes of
5 action, PNC's motion to strike portions of the complaint referring
6 to punitive or exemplary damages and attorneys' fees is denied as
7 moot. Even if Plaintiff's underlying claims were valid, she has
8 not plead a valid basis for punitive damages or attorneys' fees.

9 Under Federal Rule of Civil Procedure 12(f), the Court may
10 strike from a pleading "any redundant, immaterial, impertinent or
11 scandalous matter." Fed. R. Civ. P. 12(f). The purpose of a Rule
12 12(f) motion is to avoid spending time and money litigating
13 spurious issues. Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527
14 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517 (1994). A
15 matter is immaterial if it has no essential or important
16 relationship to the claim for relief plead. Id. A matter is
17 impertinent if it does not pertain and is not necessary to the
18 issues in question in the case. Id.

19 A. Punitive Damages

20 California Civil Code § 3294, which governs the right to
21 recover punitive damages, provides:

22 (a) In an action for the breach of an obligation not arising
23 from contract, where it is proven by clear and convincing
24 evidence that the defendant has been guilty of oppression,
25 fraud, or malice, the plaintiff, in addition to the actual
26 damages, may recover damages for the sake of example and by
27 way of punishing the defendant.

28 . . .
(c) As used in this section, the following definitions shall
apply:

(1) "Malice" means conduct which is intended by the defendant
to cause injury to the plaintiff or despicable conduct which

1 is carried on by the defendant with a willful and conscious
2 disregard of the rights or safety of others.

3 (2) "Oppression" means despicable conduct that subjects a
4 person to cruel and unjust hardship in conscious disregard of
5 that person's rights.

6 (3) "Fraud" means an intentional misrepresentation, deceit, or
7 concealment of a material fact known to the defendant with the
8 intention on the part of the defendant of thereby depriving a
9 person of property or legal rights or otherwise causing
10 injury.

11 Cal. Civ. Code § 3294. To support a claim for punitive damages, a
12 complaint must allege facts demonstrating "circumstances of
13 oppression, fraud or malice." Grieves v. Superior Court, 157 Cal.
14 App. 3d 159, 166 (1984).

15 Plaintiff contends that her allegations regarding Defendants'
16 statutory violations, lack of disclosures and failure to
17 investigate her ability to repay her loans support her prayer for
18 punitive damages. These allegations do not show "circumstances of
19 oppression, fraud or malice." See Grieves, 157 Cal. App. 3d at
20 166. Plaintiff does not allege that these violations occurred with
21 "intent to cause injury," or that they constituted "despicable
22 conduct . . . in conscious disregard" of her rights. Cal. Civil
23 Code § 3294(c).

24 Plaintiff also argues that Defendants "made misrepresentations
25 as to the terms of Plaintiff's financing." Pl. Opp. at 20.
26 Plaintiff's actual allegations are that NCB failed to explain or
27 disclose the meaning and consequences of the Yield Spread Premium
28 or the Mortgage Broker Fee that were included in her loan. Compl.
¶¶ 18-18.1. Nowhere does Plaintiff allege that Defendants' failure
to disclose the meaning of these terms was done with the intention
of depriving her of property or legal rights. Cal. Civil Code

1 § 3294(c)(3).

2 Finally, Plaintiff contends that the Complaint "alleges that
3 Defendants did not allow Plaintiff to review the loan documents,
4 made assurances that were not true, and refused to provide
5 Plaintiff with loan papers after they were requested." Pl. Opp. at
6 19. Although these allegations may show oppression, fraud or
7 malice, none of them actually appears in the Complaint. Because
8 the Complaint fails to set forth circumstances of oppression, fraud
9 or malice, Plaintiff has not plead an entitlement to punitive
10 damages. If Plaintiff is able to state any valid claims in an
11 amended complaint, she may include a prayer for punitive damages if
12 she is able truthfully to remedy these deficiencies.

13 B. Attorneys' Fees

14 Attorneys' fees may be recovered only where provided by
15 statute or contract. Cal. Civ. Proc. Code § 1021; Amtower v.
16 Photon Dynamics, Inc., 158 Cal. App. 4th 1582, 1601 (2008).
17 Plaintiff argues that she may be entitled to attorneys' fees under
18 California Code of Civil Procedure § 1021.5, or under the deed of
19 trust, which has a provision for attorneys' fees.

20 Section 1021.5 provides that a court may award attorneys' fees
21 to a successful party

22 in any action which has resulted in the enforcement of an
23 important right affecting the public interest if: (a) a
24 significant benefit, whether pecuniary or nonpecuniary, has
25 been conferred on the general public or a large class of
26 persons, (b) the necessity and financial burden of private
enforcement, or of enforcement by one public entity against
another public entity, are such as to make the award
appropriate, and (c) such fees should not in the interest of
justice be paid out of the recovery, if any.

27 Cal. Civ. Proc. Code § 1021.5. Plaintiff argues that her "attempts
28

1 to enjoin unlawful and fraudulent foreclosure practices would have
2 a public benefit." Pl. Opp. at 20. Plaintiff's prayer for
3 injunctive relief would enjoin only the foreclosure of her home.
4 Plaintiff fails to explain any public benefit to be gained from an
5 injunction against her foreclosure. Therefore, the Complaint fails
6 to plead a basis for an attorneys' fee award under section 1021.5.

7 Plaintiff also argues that she may be entitled to attorneys'
8 fees under the deed of trust. The deed provides: "Lender may
9 charge Borrower fees for services performed in connection with
10 Borrower's default, for purposes of protecting Lender's interest in
11 the Property and rights under this Security Instrument . . .
12 including, but not limited to, attorneys' fees" Deed ¶ 14.
13 Plaintiff does not explain how this provision would entitle her to
14 attorneys' fees against PNC in this action. Presumably Plaintiff
15 would invoke California Civil Code § 1717, which makes unilateral
16 fee provisions such as this one applicable to both parties to a
17 contract. See Kachlon v. Markowitz, 168 Cal. App. 4th 316, 347
18 (2008). However, following the substitution of GMAC as beneficiary
19 under the deed of trust, PNC is no longer entitled to attorneys'
20 fees under the deed. Therefore, section 1717 does not entitle
21 Plaintiff to attorneys' fees against PNC under the deed. Plaintiff
22 fails to plead a basis for an attorneys' fee award against PNC
23 under the deed of trust. If Plaintiff can remedy these
24 deficiencies, she may include a prayer for attorneys' fees in an
25 amended complaint.

26 CONCLUSION

27 For the foregoing reasons, GMAC and ETS' (Docket No. 5) and
28

1 PNC's (Docket No. 8) motions to dismiss are GRANTED. PNC's motion
2 to strike (Docket No. 9) is DENIED as moot. The Court's rulings
3 are summarized as follows:

- 4 1. Plaintiff's First and Second Causes of Action against all
5 Defendants are dismissed with leave to amend to plead a
6 valid basis for declaratory relief.
- 7 2. Plaintiff's Third, Fourth, Fifth, Sixth, Seventh, Eighth,
8 Ninth, and Twelfth Causes of Action against GMAC and ETS
9 are dismissed with leave to amend to state a claim
10 against GMAC and ETS.
- 11 3. Plaintiff's Third, Fourth, Fifth, Sixth, Seventh, Eighth,
12 Ninth, and Eleventh Causes of Action against all
13 Defendants are dismissed with leave to amend to plead a
14 basis for equitable tolling of the statute of
15 limitations.
- 16 4. Plaintiff's Tenth Cause of Action against all Defendants
17 is dismissed with leave to amend to plead tender of the
18 full loan amount.
- 19 5. Plaintiff's Twelfth Cause of Action against all
20 Defendants is dismissed with leave to amend to plead a
21 basis for a restitutionary remedy.
- 22 6. Plaintiff's Thirteenth and Fourteenth Causes of Action
23 against all Defendants are dismissed without leave to
24 amend.

25 If Plaintiff wishes to file an amended complaint, she must do
26 so within fourteen days of the date of this order. If she does,
27 Defendants must respond twenty-one days later. If they respond
28

1 with a motion to dismiss, they must notice it for October 6, 2011
2 at 2 P.M. A case management conference will be held on that date
3 and time. If Plaintiff does not timely file an amended complaint,
4 the case will be dismissed for failure to prosecute.

5 IT IS SO ORDERED.

6
7 Dated: 7/28/2011



CLAUDIA WILKEN
United States District Judge